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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FRANK MACDONALD, in His Official Capacity as the Labor Commissioner of the State of Nevada,

Petitioner,

v.

ASSOCIATED BUILDERS AND CONTRACTORS, INC., SIERRA NEVADA CHAPTER; ELECTRICAL JOINT APPRENTICESHIP COMMITTEE; SIERRA NEVADA CHAPTER ABC APPRENTICESHIP TRUST FUND,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

FRANKIE SUE DEL PAPA
Attorney General of Nevada

ROBERT KIRKMAN*
LOUIS LING
Deputy Attorneys General
Heroes Memorial Building
Capitol Complex
Carson City, Nevada 89710
(702) 687-4170

Counsel for Petitioner
*Attorney of Record

QUESTION PRESENTED FOR REVIEW

DID THE NINTH CIRCUIT ERR BY RULING THAT NRS 338.080(2) IS PREEMPTED BY ERISA AND BY JUDICIALLY CREATING AND IMPOSING ON NEVADA A REQUIREMENT FOR AUTOMATIC APPROVAL BY THE NEVADA STATE APPRENTICESHIP COUNCIL OF ALL PROGRAMS REGISTERED BY THE FEDERAL BUREAU OF APPRENTICESHIP AND TRAINING IN DIRECT CONTRAVENTION TO THE EXPRESS TERMS AND INTENT OF THE FITZGERALD ACT?

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

OPINIONS AND JUDGMENTS BELOW 2

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL PROVISION, STATUTES, AND REGULATIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

THE NINTH CIRCUIT ERRED BY RULING THAT NRS 338.080(2) IS PREEMPTED BY ERISA AND BY JUDICIALLY CREATING AND IMPOSING ON NEVADA A REQUIREMENT FOR AUTOMATIC APPROVAL BY THE NEVADA STATE APPRENTICESHIP COUNCIL OF ALL PROGRAMS REGISTERED BY THE FEDERAL BUREAU OF APPRENTICESHIP AND TRAINING IN DIRECT CONTRAVENTION TO THE EXPRESS TERMS AND INTENT OF THE FITZGERALD ACT 5

1. The Ninth Circuit Exceeded the Express Language and Intent of the Fitzgerald Act and 29 C.F.R. Part 29 in Finding that NRS 338.080(2) Was Preempted by ERISA. 12

2. The Ninth Circuit's Opinion Will Create Upheaval and Doubt Among Thirty SACs. 21

3. The Ninth Circuit's Opinion is Raw Judicial Legislation 26

CONCLUSION 30

APPENDICES

TABLE OF AUTHORITIES

CASES

Associated Builders & Contractors v. MacDonald, 731 F.Supp. 966 (D.Nev. 1989) .....2, Appx.B

Curtis v. Loether, 415 U.S. 189, 94 S.Ct. 1005 (1974) 13

Electrical Joint Apprenticeship v. MacDonald, ____ F.2d ____ (9th Cir., November 8, 1991) ...2, 13, 18, 28, Appx.A

Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 98 S.Ct. 2010 (1978) 26

Moody v. Albemarle Paper Co., 417 U.S. 623, 94 S.Ct. 2513 (1974) 27

St. Martin Evangelical Lutheran v. South Dakota, 451 U.S. 777, 101 S.Ct. 2142 (1981) 13

United States v. Locke, 471 U.S. 93, 105 S.Ct. 1785 (1985).....26

U.S. v. Thirty-Seven Photographs, 402 U.S. 363, 91 S.Ct. 1400 (1971) 13

FEDERAL STATUTES

28 U.S.C. §1254 2
29 U.S.C. §1144(a) 2, Appx.C-1
29 U.S.C. §1144(d) 2, 13, Appx.C-1
42 U.S.C. §50 ..... 2, 6, 7, 13, 14, Appx.C-1

FEDERAL REGULATIONS

29 C.F.R. Part 29 ..... 6, 7, 11, 13, 14, 15, 18, 19, ... 20, 24, 25, 29
29 C.F.R. §29.1(b) 2, 7, 8, 14, Appx.C-2
29 C.F.R. §29.2(k) 14
29 C.F.R. §29.2(o) 2, 14, 20, Appx.C-2
29 C.F.R. §29.3(a) 14
29 C.F.R. §29.12 ..... 2, 13, 14, Appx.C-3
29 C.F.R. §29.12(a) 8, 11, 14, 20, 21, Appx.C-3
29 C.F.R. §29.12(a)(5) 15, 18, Appx.C-3
29 C.F.R. §29.12(b) 9, Appx.C-3
29 C.F.R. §29.12(b)(8) 9, Appx.C-5
29 C.F.R. §29.12(e)(1) 14, Appx.C-7
29 C.F.R. §29.12(e)(2) 14, Appx.C-7
29 C.F.R. §29.13 ..... 2, 14, 19, Appx.C-8
29 C.F.R. §29.13(d) 14, Appx.C-9
29 C.F.R. §29.13(e) 14, Appx.C-10
29 C.F.R. §29.13(f) 14, Appx.C-10

STATE STATUTES

Ariz.Rev.Stat. §§23-221 to 23-225 22
Cal. Labor Code §1777.5 23
Cal. Labor Code §§3070 to 3098 22
Conn.Gen.Stat §§31-51a to 31-51e 22

Del. Code tit. 19, §§8512 22
D.C.Code §§36-401 to 36-415 22
Fla.Stat. §§446.011 to 446.101 22
Haw.Rev.Stat. §§72-1 to 72-8 22
Kan.Stat. §§44-639 22
Ky.Rev.Stat. 343.010 to 343.090 22
La.Rev.Stat. §§23:381 to 23:392.....22
Maine Rev.Stat. tit. 26, §§1001 to 1007 22
Md. State Fin. & Proc. Code, §17-201(b) 22, 24
Md. State Fin. & Proc. Code, §17-208(e) 23
Mass.Gen.L. ch. 23, §§11E to 11L 22
Mass.Gen.L. ch. 149, §26 23
Minn.Stat. §§178.01 to 178.10.....22
Minn.Stat. §178.03(4).....24
Mont.Code §§39-6-101 to 39-6-107.....22
Nev.Rev.Stat. 338.080 .....3, 4, 12, Appx.C-12
Nev.Rev.Stat. 338.080(2) 18, 21, 23, 24, 28
Nev.Rev.Stat. Chapter 610 .....6, 11, 18
Nev.Rev.Stat. 610.010 to 610.190 22
N.H.Rev.Stat. §§278:1 to 278:10 22
N.M.Stat. 50-7-1 to 50-7-7 22
N.Y. Labor Law §§810 to 818 22
N.Y. Labor Law §§220(3) & 231(7)(a) 23
N.C.Gen.Stat. §§94-1 to 94-11 22
Ohio Rev. Code §§4101.25 to 4101.30 22
Ohio Rev. Code §4115.05 23
Or.Rev.Stat. §§660.002 to 660.205 23
Or.Rev.Stat. §660.158 24
43 Pa.Cons.Stat. §§90.1 to 90.10 22
43 Pa.Cons.Stat. §164-3(7).....23
P.R. Laws tit. 29, §§11 to 18.....22
R.I.Gen.Laws §§28-45-1 to 28-45-17 22
R.I.Gen.Laws §28-45-16 24

R.I.Gen.Laws §37-13-7(c) 23
Vt.Stat. tit. 21, §§1101 to 1105 22
Va.Code §§40.1-117 to 40.1-127 22
Wash.Rev.Code §§49.04.010 to 49.04.910 22
Wash.Rev.Code §39.12.021 ..... 23, 24
Wis.Stat. §§106.01 to 106.03)(1911). 23

MISCELLANEOUS AUTHORITIES

42 Fed.Reg. 10139 (Feb. 18, 1977),
paragraph 8 ..... 3, 9, 15, 19, Appx.C-10

New Mexico AGO 6244 (1955-1956) 23

Washington AGO 1985 No.5 24

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FRANK MacDONALD, in his official capacity as the Labor Commissioner of the State of Nevada

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ASSOCIATED BUILDERS AND CONTRACTORS, INC., SIERRA NEVADA CHAPTER; ELECTRICAL JOINT APPRENTICESHIP COMMITTEE; SIERRA NEVADA CHAPTER ABC APPRENTICESHIP TRUST FUND,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Frank MacDonald respectfully petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this action on November 8, 1991.

OPINIONS AND JUDGMENTS BELOW

The opinion of Ninth Circuit Court of Appeals has not yet been published in the Federal Reporter, but it can be found in an advance sheet publication from the Ninth Circuit. A reprint of this advance sheet publication is in the Appendix A and will be referred to herein as *MacDonald II*.

The district court officially published its opinion as *Associated Builders & Contractors v. MacDonald*, 731 F.Supp. 966 (D.Nev. 1989). This opinion is reprinted in the Appendix B and will be referred to herein as *MacDonald I*.

STATEMENT OF JURISDICTION

The judgment to be reviewed was entered by the Ninth Circuit Court of Appeals on November 8, 1991. No rehearing was sought.

The Court has jurisdiction to review the judgment of the Ninth Circuit pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The statutes and regulations involved in this case are as follows:

29 U.S.C. §§1144(a) and (d), commonly known as the Employee Retirement Income and Security Act of 1974 (hereinafter ERISA);

42 U.S.C. §50, commonly known as the Fitzgerald Act;

29 C.F.R. §§ 29.1(b), 29.2(o), 29.12, and 29.13;

42 Fed.Reg. at 10139 (February 18, 1977), at paragraph 8; and

NRS 338.080.

Because of the provisions involved are lengthy, they have only been cited here and the pertinent text can be found in the Appendix at C-1.

STATEMENT OF THE CASE

On November 8, 1984, Respondents Associated Builders and Contractors, Inc. Sierra Nevada Chapter, Electrical Joint Apprenticeship Committee, Sierra Nevada ABC Apprenticeship Trust Fund (hereinafter ABC) presented its proposal for an electrician apprentice program to the Nevada State Apprenticeship Council (hereinafter NSAC). ABC claimed that it had already received the approval of the federal Bureau of Apprenticeship and Training (hereinafter BAT) for its electrician apprentice program.

On November 29, 1984, after due consideration of ABC's application, NSAC denied the application and did not approve ABC's proposed electrician apprentice program.

On July 21, 1989, ABC filed its complaint against only the Nevada Labor Commissioner in this matter along with a motion for preliminary injunction.

On August 15, 1989, the Nevada Labor Commissioner filed his Answer.

On October 20, 1989, a hearing was held before the United States District Court, District of Nevada, Judge Bruce R. Thompson presiding. At this hearing, the motion for preliminary injunction was consolidated with a final adjudication on the merits. Pursuant to a stipulation of the

parties, the hearing included oral argument but no evidentiary hearing.

On December 22, 1989, the district court entered its Findings of Fact, Conclusions of Law and Judgment.

On January 5, 1990, the Labor Commissioner filed a motion to alter or amend the judgment.

On February 28, 1990, the district court issued its order on the motion to alter or amend.

The district court's Findings of Fact, Conclusions of Law and Judgment, as published at 731 F.Supp. 966, held that NRS 338.080(2) was preempted by ERISA and enjoined the Labor Commissioner from enforcing the provisions NRS 338.080 against ABC apprentices. The district court also held that NRS 338.080 was unconstitutional on its face and as applied to ABC as NRS 338.080 related to apprenticeship programs approved by BAT.

The Labor Commissioner appealed the district court's judgment to the Ninth Circuit of Appeals.

On April 8, 1991, oral argument was held before the Ninth Circuit Court of Appeals before Procter Hug, Jr. and Cecil F. Poole, Circuit Judges, and C. Clyde Atkins, District Judge sitting by designation.

On November 8, 1991 the Ninth Circuit entered its opinion and order. In its order, the Ninth Circuit affirmed the district court's ruling that NRS 338.080, as interpreted by the Labor Commissioner, was preempted by ERISA. The Ninth Circuit vacated the district court's holding that NRS 338.080 was unconstitutional as violating the Equal Protection Clause of the United States Constitution. No rehearing was sought of the Ninth Circuit's opinion and order. This Petition for Writ of Certiorari ensues from the Ninth Circuit's opinion and order.

Federal subject matter jurisdiction in the court of first instance was pursuant to federal questions under ERISA (29 U.S.C. §§1144(a) and 1132(a)) and 42 U.S.C. §1983.

REASONS FOR GRANTING THE WRIT

THE NINTH CIRCUIT ERRED BY RULING THAT NRS 338.080(2) IS PREEMPTED BY ERISA AND BY JUDICIALLY CREATING AND IMPOSING ON NEVADA A REQUIREMENT FOR AUTOMATIC APPROVAL BY THE NEVADA STATE APPRENTICESHIP COUNCIL OF ALL PROGRAMS REGISTERED BY THE FEDERAL BUREAU OF APPRENTICESHIP AND TRAINING IN DIRECT CONTRAVENTION TO THE EXPRESS TERMS AND INTENT OF THE FITZGERALD ACT.

Three substantial reasons justify the granting of certiorari to review the opinion of the Ninth Circuit Court of Appeals:

1. The Ninth Circuit exceeded the express language and dictates of the Fitzgerald Act and the implementing regulations in finding that the Nevada Labor Commissioner's interpretation of NRS 338.080(2) is preempted by ERISA, and only this Court can rebalance the apprenticeship law between the federal and state agencies.

2. Twenty-six states, including Nevada, the District of Columbia, and three

United States protectorates have apprenticeship laws similar to Nevada's that are registered pursuant to the Fitzgerald Act, and the Ninth Circuit's opinion has generated upheaval and unsettling doubt where no such doubt and upheaval were necessary, leaving thirty state apprenticeship agencies in doubt as to the future applicability of their apprenticeship laws.

3. In finding ERISA preemption, the Ninth Circuit engaged in raw "judicial legislation," grafting onto NRS 338.080(2) an automatic reciprocity requirement that is not required by either the Fitzgerald Act or the implementing regulations, and only this Court can curb such "judicial legislation."

The basic question before the district court, the Ninth Circuit, and now this Court is whether, to avoid ERISA preemption, the NSAC must automatically approve apprenticeship programs that have previously received BAT approval. Both the Ninth Circuit and the district court committed a fundamental error by judicially grafting a requirement of automatic reciprocity between apprenticeship programs registered by the BAT and the NSAC onto the Fitzgerald Act (29 U.S.C. § 50, et seq.) as implemented by regulation (29 C.F.R. Part 29) and as implemented in Nevada through the Nevada Apprentice Act (NRS Chapter 610). Automatic reciprocity is in contravention to the express language of the Fitzgerald Act and the regulations. By this fundamental error, the Ninth Circuit and the district court have relegated the NSAC into a mere "rubber stamp"

of BAT-registered programs. The issue presented is exceptionally important to all thirty state apprenticeship councils or agencies (hereinafter SACs), because the Ninth Circuit's opinion, if allowed to stand, will render all SACs virtually impotent and useless.

A correct understanding of the present controversy must come through an understanding of the statutory framework within which the controversy arose. Accordingly, following is a brief survey of the pertinent statutory and regulatory provisions to provide the necessary context within which this controversy must be decided.

The Fitzgerald Act is a model of pithy legislation, consisting of only three paragraphs, of which only 29 U.S.C. § 50 is relevant to the present inquiry, and it provides in pertinent part:

> The Secretary of Labor is hereby authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contract of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, ***to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship***.... (Emphasis supplied).

Pursuant to the dictates of the brief Fitzgerald Act, the Secretary of Labor promulgated regulations, 29 C.F.R. Part 29. 29 C.F.R. § 29.1(b) states the intent of the regulations:

> The purpose of this part is to set forth labor standards to safeguard the welfare of apprentices, and to extend the application of such standards by prescribing policies and procedures concerning the registration, ***for certain Federal purposes***, or acceptable apprenticeship programs with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training. These labor standards, policies, and procedures cover the registration, cancellation and deregistration or [sic] apprenticeship programs and of apprenticeship agreements: ***the recognition of a State agency as the appropriate agency for registering local apprenticeship programs for certain Federal purposes***; and matters relating thereto. (Emphasis supplied).

Thus, both the Fitzgerald Act and 29 C.F.R. § 29.1(b) recognize and expressly create a role for registered state apprenticeship agencies.

State apprenticeship agencies recognized by the Secretary of Labor are given exclusive power to make determinations of the appropriateness of apprenticeship programs within their jurisdiction by 29 C.F.R. § 29.12(a), which provides in pertinent part:

> The Secretary's recognition of a State Apprenticeship Agency or Council (SAC) ***gives the SAC the authority to determine whether an apprenticeship***

> ***program conforms with the Secretary's published standards*** and the program is, therefore, eligible for those Federal purposes which require such a determination by the Secretary.... (Emphasis supplied).

Thus, where an SAC has received federal recognition, the SAC is the agency empowered to make determinations as to the approval of apprenticeship programs brought within the state's jurisdiction. To receive federal recognition, a state apprenticeship council must satisfy a lengthy list of requisites provided in 29 C.F.R. § 29.12(b).

Within the list of requisites, there is no requirement that an SAC must grant automatic reciprocal recognition of BAT-registered programs or sister-state SAC-approved programs. In fact, only one section of the requirements imposed on SACs addresses any form of reciprocity (29 C.F.R. § 29.12(b)(8)), but that subsection is inapplicable to the instant case. In explanatory comments entitled "Policies and Procedures" that served as an elucidating preamble to 29 C.F.R. Part 29, the Secretary of Labor expressly discussed the interrelationship of SACs and the BAT:

> 8. Several persons believed that the requirements contained throughout § 29.12 represent an unwarranted intrusion of Federal control into the operations of the SACs. The Department believes that this conclusion is not correct.
>
> As far as the Department knows, the recognized SACs are already in substantial conformity with the ***minimum standards***

set forth in this § with the exception of paragraphs (b)(8) and (b)(10), which have been addressed earlier. Where they are not, paragraph (c) affords the State a 120-day period within which to conform. An extension of time may be granted by the Administrator of the Bureau for good cause.

It does not seem to the Department that it will be an undue hardship for the SACs to conform to the ***minimal requirements*** set forth in this part or to provide to the Department the information required by § 29.12(a), since recognition by the Secretary has important economic effects (as in the operation of the Davis-Bacon Act and the Service Contract Act) and important effects in promoting and improving the apprenticeship system. For these reasons it seems reasonable to the Department that the Secretary have documentary evidence that a recognized State agency is conforming to the ***minimum standards*** set forth in this part.

Some persons have read §29.12(a)(5) in a manner which does not appear justified by the text. It requires a SAC to submit to the Bureau "a description of policies and operating procedures which depart from or impose requirements in addition to those prescribed in this part." While the Bureau has the right to approve or disapprove such variations, ***the purpose of this provision is not to enable the Bureau to control SACs or to dictate policies***

> ***and procedures***. Rather, it allows the Secretary to be informed of the policies and procedures of the SACs to which the Secretary has accorded recognition. The Department can then make its own judgment on whether these policies and procedures conflict with the requirements of this part. (Emphasis supplied). 42 Fed. Reg. 10139 (Feb. 18, 1977).

In 1939, the Nevada Legislature created the Nevada Apprentice Act, codified as NRS Chapter 610. The Nevada Apprentice Act created NSAC, and NSAC is a state apprenticeship council recognized by the Secretary of Labor. To have granted such recognition, the Secretary of Labor must have determined that the Nevada Apprentice Act complied with the applicable federal requirements. 29 C.F.R. §29.12(a). In fact, it has never been contended by any party to this action nor determined by any court that the Nevada Apprentice Act does not fully comply with the Fitzgerald Act and 29 C.F.R. Part 29. The NSAC is one of thirty SACs that have received federal recognition.[1]

Respondent ABC does not and has not challenged any of the statutes contained in the Nevada Apprentice Act as being in contravention to the Fitzgerald Act or 29 U.S.C.

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[1] The states that have SACs that have been approved and registered by the Secretary of Labor are: Arizona, California, Connecticut, Delaware, Florida, Hawaii, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and Wisconsin. Additionally, SACs have been approved and registered in the District of Columbia, Puerto Rico, and the Virgin Islands.

Part 29. Rather, ABC claims that NRS 338.080(2) is preempted by ERISA. NRS 338.080(2) provides:

> **Exemptions.** None of the provisions of NRS 338.020 to 338.090, inclusive, apply to:
> ***
> 2. Apprentices recorded under the provisions of chapter 610 of NRS.

The effect of NRS 338.080(2) is to exempt contractors employing apprentices in NSAC-approved programs from the "prevailing wage" requirements of NRS 338.020 to 338.090 that would otherwise be applicable to the payment of wages to workers on Nevada ***state*** public works projects. ABC argued that NRS 338.080(2) was preempted by ERISA because only apprenticeship programs registered by NSAC would be eligible for the exemption of NRS 338.080(2) and that a program registered only with the BAT would not be allowed the same exemption. Both the district court and the Ninth Circuit agreed with ABC's arguments, and thus this Petition ensues.

1. THE NINTH CIRCUIT EXCEEDED THE EXPRESS LANGUAGE AND INTENT OF THE FITZGERALD ACT AND 29 C.F.R. PART 29 IN FINDING THAT NRS 338.080(2) WAS PREEMPTED BY ERISA.

The first reason why the Ninth Circuit's ruling was incorrect and dangerous is that the ruling is antithetical and

contrary to the express language and intent of the Fitzgerald Act and 29 C.F.R. Part 29. As a result of the Ninth Circuit's fundamental misunderstanding of the statutory framework established by the Fitzgerald Act, the Ninth Circuit's misapplication of ERISA and the Fitzgerald Act threatens to destroy the salutary apprenticeship system that the Fitzgerald Act was established to foster.

The "cardinal principle" of this Court in construing a statute is whether a construction of the statute is fairly possible that will avoid constitutional questions. *St. Martin Evangelical Lutheran v. South Dakota*, 451 U.S. 777, 780, 101 S.Ct. 2142, 2147 (1981); *Curtis v. Loether*, 415 U.S. 189, 193, 94 S.Ct. 1005, 1007 (1974); *U.S. v. Thirty-seven Photographs*, 402 U.S. 363, 369, 91 S.Ct. 1400, 1404 (1971).

Initially, the Ninth Circuit correctly acknowledged that ERISA preemption would not extend to the Fitzgerald Act or 29 C.F.R. Part 29. *MacDonald II*, at 15247 (Appendix A). This is entirely in keeping with the "savings clause" contained in ERISA itself. 29 U.S.C. §1144(d). Where the Ninth Circuit erred is in finding that Nevada law was not fully in compliance with the Fitzgerald Act.

A cascade of logic flows from the ERISA "savings clause" provided at 29 U.S.C. §1144(d). ERISA does not preempt "any law of the United States ... or any rule or regulation issued under any such law." 29 U.S.C. §1144(d). The Fitzgerald Act and 29 C.F.R. Part 29 are laws of the United States and regulations saved from ERISA preemption. *MacDonald II*, at 15247 (Appendix A). The Fitzgerald Act and 29 C.F.R. Part 29 expressly allow for the recognition of SACs. 29 U.S.C. §50; 29 C.F.R. §29.12. Thus, because NSAC is recognized by the Secretary of Labor, it is necessarily fully ***in compliance*** with the

Fitzgerald Act, and NRS Chapter 610 is ***not preempted*** by ERISA.

Recognition of an SAC by the Secretary of Labor "***gives the SAC the authority to determine whether an apprenticeship program conforms with the Secretary's published standards*** and the program is, therefore, eligible for those ***Federal purposes*** which require such a determination by the Secretary." (Emphasis supplied). 29 C.F.R. §29.12. Thus, NSAC was given the authority by the Secretary of Labor to determine whether apprenticeship programs in Nevada conform with the Fitzgerald Act and 29 C.F.R. Part 29.

The Fitzgerald Act and 29 C.F.R. Part 29 specifically address the registration of apprenticeship programs for "***Federal purposes***."[2] State or local purposes for registration are addressed only in 29 C.F.R. §29.2(o), which provides:

> (o) *Recognized State Apprenticeship Agency or recognized State Apprenticeship Council* shall mean an organization approved by the Bureau as an agency or council which has been properly constituted under an acceptable law or Executive order, and has been approved by the Bureau as the appropriate body for ***State registration and/or approval of local***

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[2] Reference is made to "federal purposes" in the following: 29 U.S.C. §50; 29 C.F.R. §§ 29.1(b), 29.2(k) (definition of "Federal purposes"), 29.3(a), 29.12(a), 29.12(e)(1), 29.12(e)(2), 29.13, 29.13(d), 29.13(e), and 29.13(f).

apprenticeship programs and agreements for Federal purposes. (Emphasis supplied).

Thus, the logic of the Fitzgerald Act, as implemented by 29 C.F.R. Part 29, is that ***for Federal purposes*** an apprenticeship program can be approved either by the BAT or a recognized SAC, but ***for State purposes*** an apprenticeship program's approval is left to a recognized SAC.

Furthermore, the "Policies and Procedure" that served as the preamble to 29 C.F.R. Part 29 clearly show that the intent of the drafters of 29 C.F.R. Part 29 intended the requirements of 29 C.F.R. § 29.12 to be ***minimal requirements***. Three references to "minimum standards" or "minimal requirements" are made in paragraph 8. 42 Fed. Reg. at 10139. Also, paragraph 8 acknowledges that 29 C.F.R §29.12(a)(5) anticipates that SACs may make requirements in addition to the requirements contained in 29 C.F.R. §29.12 and that it was the drafters' intention that "the Bureau [have] the right to approve or disapprove such variations, [and that] the purpose of this provision ***is not to enable the Bureau to control SACs or to dictate policies and procedures***." (Emphasis supplied). 42 Fed. Reg. at 10139.

In light of the logic of the Fitzgerald Act, 29 C.F.R. Part 29, and the drafters' intent contained in the "Policies and Procedures" preamble to 29 C.F.R. Part 29, the Ninth Circuit's pronouncements are jarring. In two paragraphs crucial to the Ninth Circuit's holding, the Ninth Circuit's misunderstanding of the Fitzgerald Act becomes apparent.

It is clear that the JAC apprenticeship program, sponsored by ABC and approved

by BAT, is an apprenticeship program as defined by ERISA, ***and thus cannot be regulated by the State apart from its approval functions under the Fitzgerald Act regulations***. As we have noted, in order for any apprenticeship program to work effectively, the employer must be able to pay a lesser wage to the apprentices while they are learning their skilled trade. The denial of the exemption to the BAT-approved JAC apprenticeship program, because it was not also approved by the Nevada State Apprenticeship Council, ***in effect forces ABC's JAC apprenticeship program to comply with the standards of the State Committee, independent and apart from the regulation authorized and provided for by the Fitzgerald Act and its accompanying regulations***. The approval of the JAC apprenticeship program by BAT in effect establishes that that program meets the requirements of the Fitzgerald Act, the only apprenticeship regulations that are permissible as not being preempted by § 524(a) of ERISA. ***Any state regulation inconsistent with that determination is preempted by §514(a) of ERISA***. Thus, the decision of the district court in enjoining the Nevada Labor Commissioner from enforcing NRS §338.080, so as not to exempt the JAC apprenticeship program from the provisions

of the Nevada prevailing wage statutes, is warranted because an order denying the exemption amounts to indirect State regulation of the apprenticeship program. (Footnote omitted).

We thus have a state law within the meaning of ERISA, 1144(c)(1), that requires the proposers of an apprenticeship program ***to comply with state standards apart from those set forth in the non-preempted Fitzgerald regulations***. To be preempted under ERISA, a state law must both "relate to" and "purport to regulate" directly or indirectly an employee welfare benefit plan. *Hydrostorage*, 891 F.2d at 729; *Jones*, 846 F.2d at 1218. "A law 'purports to regulate' a plan if it attempts 'to reach in one way or another the terms and conditions of employee benefit plans.'" *Jones*, 846 F.2d at 1218 (quoting *Lane v. Goren*, 743 F.2d 1337, 1339 (9th Cir. 1984)). The intended action of the Nevada Labor Commissioner to deny the exemption of the JAC apprenticeship program because it had not obtained the approval of the State agency is an interpretation of a law that compels preemption. Just as our opinion in *Hydrostorage* did not declare the entire California statutory provision preempted but, instead, the administrative application of that provision preempted, so we do not conclude NRS § 338.080 preempted, but rather the Labor Commissioner's intended

interpretation and application of it. (Emphasis supplied). *MacDonald II*, at 15249-15250 (Appendix A).

The Ninth Circuit's reading of the Fitzgerald Act and the Nevada Apprentice Act is wrong. The Nevada Apprentice Act does not, in any way, set "state standards apart from those set forth in the non-preempted Fitzgerald regulations" or "standards of the State Committee, independent and apart from the regulation authorized an provided for by the Fitzgerald Act and its accompanying regulations" or standards that were "inconsistent" with the Fitzgerald Act. Indeed, the argument frequently asserted by ABC to the Ninth Circuit was that the standards in NRS Chapter 610 and 29 C.F.R. Part 29 were virtually identical.

The question before the Ninth Circuit was not whether the Nevada Apprentice Act set standards apart from the Fitzgerald Act, but rather whether the NSAC was required to automatically approve an apprenticeship program that had received BAT recognition. ***No such reciprocity is required*** by the Fitzgerald Act or 29 U.S.C. Part 29. Instead, the logic of the Fitzgerald Act and 29 U.S.C. Part 29 leaves the authority to approve state apprenticeship programs for state purposes with the SACs. Thus, any requirement by NSAC that ABC apply to NSAC for state approval for state programs is entirely consistent with and flows directly from the Fitzgerald Act and 29 U.S.C. Part 29.

Furthermore, even if the exemption provided in NRS 338.080(2) is viewed as a "standard apart" from the Fitzgerald Act as is asserted by the Ninth Circuit, such "standards apart" are expressly contemplated and allowable under the Fitzgerald Act. 29 C.F.R. §29.12(a)(5); 42

Fed.Reg. at 10139, paragraph 8. The drafters of 29 C.F.R. Part 29 acknowledged that their intent was not to control SACs, but rather to establish minimal standards with which all SACs would need to comply. If the Secretary of Labor disagreed with any "standards apart" from the Fitzgerald Act made by an SAC, the Secretary of Labor could assert that the requirements were improper, and could, if necessary, initiate derecognition proceedings against the SAC if the SAC insisted on its "standards apart" from the Fitzgerald Act. See, 29 C.F.R. § 29.13. The controversy before the Ninth Circuit, though, did not involve derecognition, and in fact, the Secretary of Labor, the BAT, and the NSAC were ***not*** in any way parties in the action nor involved in any other way.

ABC itself acknowledged that the path to apprenticeship program approval for Nevada state public works projects ran through the NSAC because ABC did apply to the NSAC for approval. Indeed, only two facts were used by the district court and the Ninth Circuit as the factual support for their decisions: (1) that Respondents applied to the NSAC and were denied approval, and (2) that no non-union apprenticeship program had ever been approved by the NSAC. In the interim between those opinions and this Petition, NSAC has approved three non-union apprenticeship programs, including a program submitted by a southern Nevada chapter of ABC.

Thus, the procedures established under the Fitzgerald Act and 29 C.F.R. Part 29 had been followed to the letter: an SAC had been applied to by an apprenticeship program seeking local and state approval. It was not until over four years ***after*** NSAC denied ABC's application that ABC filed the instant action against the Labor Commissioner. Viewed in this context, the instant action is nothing more than an

appeal to the federal courts of a decision by the NSAC and the Labor Commissioner. Nevada has statutory procedures that would have allowed judicial review by a Nevada state court, but ABC did not avail itself of these procedures. See, NRS 233B.130 to 233B.140.

The devastating effect of the Ninth Circuit's holding is that while Nevada's statutory scheme has received federal recognition as being fully in compliance with the Fitzgerald Act, it is preempted by the very same Fitzgerald Act. The Fitzgerald Act, as implemented by 29 C.F.R. Part 29, specifically and expressly provides that SACs are the agencies for approval of apprenticeship programs for state and local purposes (29 C.F.R. § 29.2(o)), and that once recognized, SACs have the approval authority for apprenticeship programs in their jurisdictions (29 C.F.R. § 29.12(a)). The Fitzgerald Act allows that approval of apprenticeship programs for state and local purposes is to be left to the SACs. NSAC is a federally-recognized agency. And yet, when NSAC insisted that the dictates of the Fitzgerald Act as implemented through the NSAC be followed for ABC's programs that sought approval for state and local projects, NSAC is told that its efforts are preempted by the same Fitzgerald Act that empowered it and to which it was adhering. The Ninth Circuit, in effect, ordered the Labor Commissioner to strictly adhere to the Fitzgerald Act and then told the Labor Commissioner that it was impossible for him to comply with the Fitzgerald Act.

Thus, the Ninth Circuit's ruling far exceeded the question before the court and ran directly contrary to the express language and intent of the Fitzgerald Act and 29 C.F.R. Part 29. Had the Ninth Circuit correctly perceived that NSAC was acting entirely within its power and authority as granted by the Fitzgerald Act, it could not have ruled that

NRS 338.080(2) was preempted by ERISA because the Fitzgerald Act is not preempted by ERISA.

The Ninth Circuit abandoned the "cardinal principle" that constitutional questions should be avoided where possible. Had the Ninth Circuit followed the logic of the Fitzgerald Act as set out above, it would have found that the Nevada Apprentice Act was not preempted by ERISA because the Nevada Apprentice Act was entirely consistent with the Fitzgerald Act. If the Nevada Apprentice Act was not preempted by ERISA, NSAC's review of BAT-approved programs was also within the scope of NSAC's powers and authority flowing directly from the Fitzgerald Act and 29 C.F.R. §29.12(a). Thus, if BAT programs had to seek approval of NSAC to work on state and local projects, NRS 338.080(2) was and is consistent with NSAC's powers and authority that flow directly from the Fitzgerald Act. Following such a logical chain, the Ninth Circuit could have and should have avoided applying ERISA preemptively against NRS 338.080(2). Unfortunately, the Ninth Circuit did not follow the logical chain provided by the Fitzgerald Act, and thus erroneously found NRS 338.080(2) preempted by ERISA. By so doing, the Ninth Circuit violated the "cardinal principle" of statutory construction enunciated by this Court. Only the granting of the writ by this Court can allow rectification of the Ninth Circuit's errors.

2. THE NINTH CIRCUIT'S OPINION WILL CREATE UPHEAVAL AND DOUBT AMONG THIRTY SACS.

The Ninth Circuit's misapplication of ERISA preemption and the Fitzgerald Act potentially will affect the workings of all thirty existing registered SACs. Many of the SACs are similarly situated to NSAC in that they were created and have been operating for forty or fifty years, and only now are finding that ERISA may preempt long-standing portions of their laws that are vital to their operation of their SACs and apprenticeship programs within their jurisdiction.

Since the creation of the Fitzgerald Act, thirty SACs have been recognized by the Secretary of Labor.[3] Three

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[3] The apprenticeship acts or other legislation and the year of establishment of the acts or legislation for the thirty recognized SACs are as follows: Arizona (Ariz.Rev.Stat. §§23-221 to 23-225)(1941); California (Cal. Labor Code §§3070 to 3098)(1936); Connecticut (Conn.Gen.Stat §§31-51a to 31-51e)(1959); Delaware (Del. Code tit. 19, §§8512)(1939); District of Columbia (D.C.Code §§36-401 to 36-415)(1946); Florida (Fla.Stat. §§446.011 to 446.101)(1947); Hawaii (Haw.Rev.Stat. §§72-1 to 72-8)(1941); Kansas (Kan.Stat. §§44-639)(1941); Kentucky (Ky.Rev.Stat. 343.010 to 343.090)(1931); Louisiana (La.Rev.Stat. §§23:381 to 23:392)(1938); Maine (Maine Rev.Stat. tit. 26, §§1001 to 1007)(1943); Maryland (Md. State Fin. & Proc. Code, §§17-201(b))(1937); Massachusetts (Mass.Gen.L. ch. 23, §§11E to 11L)(1941); Minnesota (Minn.Stat. §§178.01 to 178.10)(1939); Montana (Mont.Code §§39-6-101 to 39-6-107)(1941); Nevada (Nev.Rev.Stat. §§610.010 to 610.190)(1939); New Hampshire (N.H.Rev.Stat. §§278:1 to 278:10)(1947); New Mexico (N.M.Stat. 50-7-1 to 50-7-7)(1945); New York (N.Y. Labor Law §§810 to 818)(1941); North Carolina (N.C.Gen.Stat. §§94-1 to 94-11)(1939); Ohio (Ohio Rev. Code §§4101.25 to 4101.30)(1959); Oregon (Or.Rev.Stat. §§660.002 to 660.205)(1931); Pennsylvania (43 Pa.Cons.Stat. §§90.1 to 90.10)(1961); Puerto Rico (P.R. Laws tit. 29, §§11 to 18)(1947); Rhode Island (R.I.Gen.Laws §§28-45-1 to 28-45-17)(1967); Vermont (Vt.Stat. tit. 21, §§1101 to 1105)(1936); Virginia (Va.Code §§40.1-117 to 40.1-127)(1938); Virgin Islands (code unavailable)(1961); Washington (Wash.Rev.Code §§49.04.010

things are notable in a survey of the thirty SAC acts: (1) seven states have laws similar to NRS 338.080(2) that require SAC approval of an apprenticeship program before a discounted wage can be paid apprentices on state public works projects, (2) four states have express statutory authorization for reciprocal recognition of BAT approved programs by the SACs, and (3) two states have both discounted wages on state public works projects for SAC-approved apprentices and express statutory authorization for reciprocity between BAT approved programs and the SACs.

Seven states (California, Massachussets, New Mexico,[4] New York, Ohio, Pennsylvania, and Washington)[5] have statutes similar to NRS 338.080(2). In these states, a contractor may pay apprentices less than the "prevailing wage" or may pay a special "prevailing wage"

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to 49.04.910)(1941); and Wisconsin (Wis.Stat. §§106.01 to 106.03)(1911).

[4] In Attorney General Opinion 6244 (1955-1956), the New Mexico Attorney General interpreted New Mexico apprenticeship laws and the prevailing wage laws to mean that only SAC-approved apprentices are eligible for reduced wages on state public works projects.

[5] The statutes in each of the nine states discussed that address the need for SAC approval for apprentices to receive favorable wage treatment are: California (Cal.Labor Code §1777.5); Maryland (Md. State Fin. & Procurement Code §17-208(e)); Massachussets (Mass.Gen.Laws ch. 149, §26); New Mexico (N.M.Stat §13-4-11); New York (N.Y. Labor Law §§220(3) and 231(7)(a)); Ohio (Ohio Rev.Code §4115.05); Pennsylvania (Pa.Cons.Stat. §165-2(7)); Rhode Island (R.I.Gen.Laws §37-13-7(c); Washington (Wash.Rev.Code §39.12.021).

for apprentices on state public works projects, and "apprentices" are defined in these states as apprentices in SAC-approved programs. In fact, the Washington Attorney General examined R.C.W. 39.12.021 (a statute exceptionally similar to NRS 338.080(2) in effect) in the context of whether BAT-approved programs must be accorded favorable wage treatment where R.C.W. 39.12.021 expressly applied only to SAC programs. The Washington Attorney General determined that BAT-approved programs could not be accorded favorable wage treatment absent remedial legislation. Washington AGO 1985 No.5. Thus, if the Ninth Circuit's opinion is allowed to stand, each of these seven states, as well as Nevada, will be forced to reconsider, interpret, or revamp their statutes so as to avoid the sweeping preemption created by the Ninth Circuit.

Four states (Maryland, Minnesota, Oregon, and Rhode Island)[6] have express statutory authorization for reciprocal recognition by the SAC of BAT-approved programs. If the reasoning of the Ninth Circuit is adhered to that state apprentice acts cannot make "standards apart" from the Fitzgerald Act and 29 C.F.R. Part 29, then the validity of the reciprocity statutes in the four states that have them is in doubt, since neither the Fitzgerald Act nor 29 U.S.C. Part 29 require such reciprocity. On the other hand, if paragraph 8 of the "Policies and Procedures" (42 Fed.Reg. at 10139)

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[6] The states and statutes that have express statutory authorization for reciprocity between BAT programs and SAC approval are: Maryland (Md.State Fin & Procurement Code §17-201(b)); Minnesota (Minn.Stat. 178.03(4)); Oregon (Or.Rev.Stat. §660.158); and Rhode Island (R.I.Gen.Laws 28-45-16). Minnesota's reciprocity is limited to non-construction trades.

is given credence, then the reciprocity requirements in the four states that have them would be permissible "standards apart" from the Fitzgerald Act. Regardless, it is notable that at least four states did not assume federal-state reciprocity existed, and instead actually expressly included such reciprocity in their laws.

Two of the states (Maryland and Rhode Island) that have statutes that allow reciprocity between BAT-approved programs and the SAC also allow for favorable wages to be paid to apprentices on state public works projects. Under the rationale espoused by the Ninth Circuit, presumably only Maryland and Rhode Island might pass muster, since only in these two states are BAT-approved programs expressly given reciprocity by the SACs and allowed favorable wage treatment on state prevailing wage projects. Of course, as has already been noted, if the Ninth Circuit's rationale is adhered to, it is questionable whether the Maryland and Rhode Island statutes would be upheld, since both are the result of "standards apart" from the Fitzgerald Act and 29 C.F.R. Part 29.

As the Fitzgerald Act, 29 U.S.C. Part 29, and the "Policies and Procedures" all make clear, the SAC's were intended to enjoy some autonomy. The SAC's were ***not*** intended to be mere rubber stamps for the BAT. And yet, amid the confusion created by the Ninth Circuit's opinion and order, one thing that is clear is that the Ninth Circuit believes that ERISA and the Fitzgerald Act were intended to create sinecure SACs. The entire system of thirty SACs stands imperiled, uncertain, and unsure by the Ninth Circuit's opinion and order.

The trouble created by the Ninth Circuit's opinion and order has potentially far-reaching effects. According to the rationale of the Ninth Circuit, statutes and rules affecting

the minimum wage paid apprentices, the working conditions for apprentices, health-safety protections for apprentices, and other such salutary statutes might be preempted as being "standards apart" from the Fitzgerald Act. Thus, instead of fostering and protecting apprentices, the effect of the Ninth Circuit's opinion and order might make apprenticeship unworkable, unusable, and dangerous to employers and apprentices. Unfortunately, because of the broad sweep of the Ninth Circuit's opinion, it is dubious whether any state statutory cure can be created, since the cure to the Ninth Circuit's concerns would involve the creation of yet another "standard apart" from the Fitzgerald Act and 29 C.F.R. Part 29, and thus any such statutory cure would also run afoul of ERISA. Thus the error in logic of the Ninth Circuit is exposed, and must be corrected by this Court through the granting of the writ.

3. THE NINTH CIRCUIT'S OPINION IS RAW JUDICIAL LEGISLATION.

This Court held in *United States v. Locke*, 471 U.S. 93, 95, 105 S.Ct. 1785, 1793 (1985), that just because a legislature "might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which [the legislature] is perceived to have failed to do." There is a difference between "filling a gap left by [a legislature's] silence and rewriting rules that [the legislature] has affirmatively and specifically enacted." *Id.*, 471 U.S. at 95, 105 S.Ct. at 1793; *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625, 98 S.Ct. 2010, 2015 (1978). Courts are not "at liberty to engraft upon" a statute a meaning inconsistent with the historical limitations of a

statute. *Moody v. Albemarle Paper Co.*, 417 U.S. 623, 626, 94 S.Ct. 2513, 2515 (1974).

The Ninth Circuit's opinion creates a true Frankenstein's monster. By grafting a judicially-created federal-state reciprocity requirement onto NRS 338.080(2), the Ninth Circuit has created an entity that Nevada must abide, but cannot control. The text of the Ninth Circuit's "judicial legislation" creating this monster is found in two of the final paragraphs of its opinion and are part of the Ninth Circuit's order:

> The only State regulation of apprenticeship programs permitted by ERISA is in the application of the standards of the regulations issued under the Fitzgerald Act. Those regulations permit alternate avenues for the approval of apprenticeship programs. BAT approval is equivalent to state approval of the apprenticeship program as meeting those standards. ***Thus, if the exemption of NRS §338.080 is to apply at all, it must apply to programs that are approved by either BAT or the State Apprenticeship Council.***
>
> We are confident that it would be contrary to Nevada legislative intent to construe NRS §338.080 so as to preclude exemption of all apprenticeship programs approved by the State Apprenticeship Council. ***It is more consistent with legislative intent to construe N.R.S. §338.080 so as to permit exemption of apprenticeship programs that are***

> ***approved under the Fitzgerald Act Standards and not preempted by ERISA. This necessitates granting the exemption to an apprenticeship program that is certified as meeting those standards by either the BAT or the State Apprenticeship Council.*** (Emphasis supplied). *MacDonald II*, at 15252 (Appendix A).

Through this order, the Ninth Circuit created a revised NRS 338.080(2) that in no way resembles the NRS 338.080(2) the Nevada Labor Commissioner must still attempt to enforce. The Nevada Labor Commissioner is now faced with an insoluble conundrum. He is sworn to uphold and enforce the laws of Nevada, and NRS 338.080(2) as written allows him to exempt from the "prevailing wage" requirements of NRS Chapter 338 only "apprentices recorded under the provisions of chapter 610 of NRS." NRS 338.080(2). On the other hand, if he enforces NRS 338.080(2), he will violate the Ninth Circuit's Order.

The Ninth Circuit's "judicial legislation" is incomplete and does not answer a fundamental question of control. If the strict dictates of the Ninth Circuit's order are followed, the Labor Commissioner must allow ABC apprentices to work on state public works projects at a reduced wage, and yet, because ABC will not actually be approved by the NSAC, the Labor Commissioner will not be able to enforce any of the Nevada Apprentice Act against ABC. Numerous troubling questions arise. What wage rate must be paid to ABC apprentices? What working conditions may be imposed on the apprentices working under the ABC program? What law governs the conduct of the ABC

program? How can NSAC oversee, evaluate, and prosecute, if necessary, any violations?

The conundrum created by the Ninth Circuit's "judicial legislation" is obvious and difficult to all the states who, like Nevada, are attempting to fulfill their duties as they are empowered by the Fitzgerald Act and 29 C.F.R. Part 29. If the Ninth Circuit's ruling is allowed to stand, all states must automatically grant approval to any BAT-approved program that comes before it, even though that BAT-approved program may not satisfy statutory requirements previously approved by the BAT and even though the approval sought is solely for state and local projects. The message to apprenticeship programs is equally clear: apply only to the BAT, and once approved, you can take your program to any state in the country and receive the gift of judicially-created reciprocity. With one misguided swipe, the Ninth Circuit has reduced all thirty extant SACs to mere rubber stamps for the BAT, in direct contravention to the Fitzgerald Act and 29 C.F.R. Part 29.

Put differently, the proper forum for the creation of a federal-state reciprocity is with the Secretary of Labor and the states. Only after due deliberation, only after the states have their say, only after the BAT has its say, only after the affected apprentices and public make their contribution, only after all of these things afforded ***solely*** through the legislative process, should a federal-state reciprocity be created. The proper role of the district court and the Ninth Circuit was to note that legislative remediation might be necessary. Neither the district court, nor the Ninth Circuit, nor, indeed, this Court should usurp the legislative role and judicially write amended state statutes, especially where those state statutes were drafted to address the particular

needs and the particular projects that particularly and only affect a state's individual interests. Only this Court, by granting the writ, can free the Labor Commissioner from the restraints of the "judicial legislation" of the Ninth Circuit.

CONCLUSION

For the above stated reasons, the Nevada Labor Commissioner respectfully requests that this Court grant a writ of certiorari to allow for the reversal of the opinion and order of the Ninth Circuit Court of Appeals.

FRANKIE SUE DEL PAPA
Attorney General of Nevada

ROBERT KIRKMAN*
LOUIS LING
Deputy Attorneys General
Heroes Memorial Building
Capitol Complex
Carson City, Nevada 89710
(702) 687-4170
Counsel for Petitioner
* Attorney of Record

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELECTRICAL JOINT APPRENTICESHIP COMMITTEE; SIERRA NEVADA CHAPTER ABC APPRENTICESHIP TRUST FUND; ASSOCIATED BUILDERS AND CONTRACTORS, INC., SIERRA NEVADA CHAPTER,
Plaintiffs-Appellees,

v.

FRANK MACDONALD, in his official capacity as the Labor Commissioner of the State of Nevada,
Defendant-Appellant.

No. 90-15095

D.C. No.
CV-89-0409-BRT

ASSOCIATED BUILDERS AND CONTRACTORS, INC., SIERRA NEVADA CHAPTER; ELECTRICAL JOINT APPRENTICESHIP COMMITTEE; SIERRA NEVADA CHAPTER ABC APPRENTICESHIP TRUST FUND,
Plaintiffs-Appellees,

v.

FRANK MACDONALD, Labor Commissioner of the State of Nevada,
Defendant-Appellant.

No. 90-15395

D.C. No.
CV-89-0409-BRT

OPINION

Appeal from the United States District Court
for the District of Nevada
Bruce R. Thompson, District Judge, Presiding

Argued and Submitted
April 8, 1991—San Francisco, California

Filed November 8, 1991

Before: Procter Hug, Jr. and Cecil F. Poole, Circuit Judges, and C. Clyde Atkins,* District Judge.

Opinion by Judge Hug

SUMMARY

ERISA/Labor

Affirming a district court grant of a permanent injunction, the court of appeals held that ERISA preempted the Nevada Labor Commissioner's decision not to exempt from enforcement of Nevada's prevailing wage statute for state public works apprenticeship programs that are federally approved.

The Electrical Joint Apprenticeship Committee sought an injunction to prevent the Nevada Labor Commissioner from enforcing a provision of the Nevada prevailing wage statutes for state public works not exempting federally-approved apprenticeship programs. Electrical argued that the enforcement of the prevailing wage statutes, without allowing for the exemption, was preempted by ERISA. The district court granted a permanent injunction prohibiting the Labor Commissioner from enforcing that provision of the prevailing wage statute so as to deny the exemption to the federally approved program.

[1] Although ERISA preempts state laws relating to

*Honorable C. Clyde Atkins, Senior United States District Judge for the Southern District of Florida, sitting by designation.

employee benefit plans, ERISA has a "savings clause" that exempts federal laws from ERISA preemption. [2] ERISA therefore does not preempt the provisions of the preexisting National Apprenticeship Act, commonly known as the Fitzgerald Act, or the regulations issued thereunder. [3] 29 C.F.R. § 29.3 provides for a dual system of approval and recognition so that either the federal Bureau of Apprenticeship and Training, Employment and Training Administration (BAT) or the State Apprenticeship Council can approve an apprenticeship program for federal purposes. However, either agency is constrained in its approval to apply the requirements and standards of the federal regulations.

[4] Because there is no exemption from the broad preemption provision of section 514(a) of ERISA except for the federal Fitzgerald Act and the regulations issued thereunder, any state regulation of apprenticeship programs that is separate and apart from the authorization given by the Fitzgerald Act and its accompanying regulations is preempted by ERISA. [5] Thus, the decision of the district court to enjoin the Nevada Labor Commissioner from enforcing the state statute in question so as not to exempt the apprenticeship program in question from the provisions of the Nevada prevailing wage statutes was warranted because an order denying the exemption amounted to indirect state regulation of the apprenticeship program. [6] The court noted that it was not declaring the entire Nevada statutory scheme preempted, but rather the Labor Commissioner's intended interpretation and application of it. [7] Because the court affirmed the district court on the ground that the intended action of the Nevada Labor Commissioner was preempted by ERISA, the court did not consider the alternate ground that this action violated the Equal Protection Clause. Therefore, the court vacated that alternate portion of the judgment of the district court.

[8] The court stated that it was more consistent with Nevada legislative intent to construe the statute in question so as to permit exemption of apprenticeship programs that are

approved under the Fitzgerald Act Standards and not preempted by ERISA.

COUNSEL

Robert A. Kirkman, Deputy Attorney General, Carson City, Nevada, for the defendants-appellants.

Mark R. Thierman, Thierman, Cook, Brown & Prager, San Francisco, California, for the plaintiffs-appellees.

Marsha S. Berzon, Altshuler, Berzon, Nussbaum, Berzon & Rubin, San Francisco, California, for the amici.

OPINION

HUG, Circuit Judge:

In this action, the plaintiffs sought an injunction to prevent the Nevada Labor Commissioner from enforcing a provision of the Nevada prevailing wage statutes for state public works. The statutes require that employers contracting for construction on public works projects for any public body in the state agree to pay the prevailing wages in the county in which the public work is located. The statute provides an exemption for apprentice programs approved by the Nevada State Apprenticeship Council, but does not allow such exemption for apprenticeship programs approved by the Bureau of Apprenticeship and Training of the United States Department of Labor.

The plaintiffs contend that the enforcement of the prevailing wage statutes, without allowing an exemption for the apprenticeship program of the plaintiff Associated Builders and Contractors, Inc., Sierra Nevada Chapter ("ABC"), which

had the approval of the federal Bureau of Apprenticeship and Training ("BAT"), was preempted by the Employment, Retirement and Security Act ("ERISA"), 29 U.S.C. § 1144(a), and was also a denial of equal protection under the United States Constitution. The district court granted a permanent injunction enjoining the Labor Commissioner from enforcing that provision of the prevailing wage statute so as to deny the exemption to the federally approved program. We affirm.

I.

The Nevada Revised Statutes ("NRS") §§ 338.010-338.090 are "prevailing wage" statutes, patterned after the Davis-Bacon Act, 40 U.S.C. § 276a-276a-5, which applies to federal public works. The prevailing wage statutes provide that contractors on all public works projects for any public body in the state must agree to pay the prevailing wages in the county in which the public work is located. Failure to do so subjects the contractor to forfeitures and criminal penalties. *See* Nev. Rev. Stat. §§ 338.010-338.090 (1978).

NRS § 338.080 provides, "None of the provisions of NRS 338.010-338.090, inclusive, apply to ... [a]pprentices recorded under the provisions of chapter 610 of NRS." Chapter 610 of NRS provides for state approved apprenticeship programs. NRS § 610.144 of Chapter 610 sets forth statutory standards for eligibility for registration and approval by the State Apprenticeship Council. Among the duties of the State Apprenticeship Council are duties to establish standards for programs that are not lower than the statutory standards and to register and approve or reject proposed programs and standards for apprenticeship. NRS §§ 610.090 and 610.095.

The net effect of NRS § 338.080 and these provisions of Chapter 610 is that, unless an apprenticeship program meets the standards of NRS § 610.144 and those established by the State Apprenticeship Council and also obtains the approval of the State Apprenticeship Council, the contractor will have to

pay the same prevailing wage to apprentices as to journeymen and, thus, will face a significant disincentive to use apprentices on public works jobs.

II.

An unusual procedure was followed in this case, in that counsel stipulated that the court would render the final decision on the basis of the counsels' arguments to the court in lieu of a trial on the merits. On this basis, the district court rendered its findings of fact and conclusions of law and judgment.

The pertinent facts are as follows. Plaintiff ABC is a nonprofit trade association representing contractors who bid and enter into contracts to construct private and public works projects in the State of Nevada. Plaintiff Electrical Joint Apprenticeship Committee ("JAC") is an electrical joint apprenticeship training program approved by the federal BAT.[1] The JAC is sponsored by ABC and is not the product of a collective agreement with any labor organization. The Sierra Nevada Chapter ABC Apprenticeship Trust Fund is an employee benefit trust existing and regulated pursuant to the provisions of ERISA, which was created for the purpose of funding the JAC apprenticeship training programs. Defendant Frank MacDonald is the Labor Commissioner of the State of Nevada and is empowered and required to enforce the provisions of NRS §§ 338.010-338.090.

[1]The amicus curiae brief filed by the Central Valley Electrical Joint Apprenticeship and Training Committee and the Electrical Joint Apprenticeship Committee of San Joaquin and Calaveras Counties maintain that the Joint Apprenticeship Committee was a "training program," not an "apprenticeship program" approved by BAT. However, the district court made a finding of fact that JAC was approved by BAT as an apprenticeship program. This finding is not clearly erroneous and is not contested by defendant MacDonald on appeal.

On November 8, 1984, ABC presented its proposed JAC nonunion electrician apprenticeship standards to the State Apprenticeship Council. The State Apprenticeship Council rejected the proposed apprenticeship standards and refused to approve plaintiffs' application for the apprenticeship program despite the fact that the program already had been approved by the federal BAT. The district court found that no nonunion construction trade apprenticeship program has ever been approved by the Nevada State Apprenticeship Council, although many have applied.

It is conceded that in the enforcement of the prevailing wage statutes defendant MacDonald intends not to apply the apprenticeship exemption prescribed by NRS § 338.080 to the Joint Apprenticeship Committee.

III.

We first consider the issue of preemption by ERISA as held by the district court. ERISA is a "comprehensive remedial statute 'designed to protect the interest of employees in pension and welfare plans, and to protect employers from conflicting and inconsistent state and local regulation of such plans.'" *Local Union 598, Plumbers & Pipefitters Industry Journeymen & Apprentices Training Fund v. J.A. Jones Const. Co.*, 846 F.2d 1213, 1217 (9th Cir. 1988) (*Jones*) (quoting *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1501 (9th Cir. 1985)), *aff'd*, 488 U.S. 881, 109 S. Ct. 210, 102 L. Ed. 2d 202 (1988). ERISA governs "employee benefit plans," 29 U.S.C. § 1001, *et seq.*, which term is statutorily defined to include an "employee welfare benefit plan." 29 U.S.C. § 1002(3). An "employee welfare benefit plan" in turn is defined by ERISA as follows:

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program

> was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, *apprenticeship or other training programs,* or day care centers, scholarship funds, or prepaid legal services . . . .

29 U.S.C. § 1002(1) (emphasis added). The ERISA statute also contains a very broad preemption clause, section 514(a), 29 U.S.C. § 1144(a), which was discussed in detail in our recent case *Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Apprenticeship Comm.*, 891 F.2d 719 (9th Cir. 1989), *cert. denied,* 111 S. Ct. 72 (1990), where we stated:

> Section 514(a) of ERISA, as codified at 29 U.S.C. § 1144(a), provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan described in section 1003(a) of this title. . . ." 29 U.S.C. § 1144(a) (emphasis added). "State laws" are defined as "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." 29 U.S.C. § 1144(c)(1). A "state" is defined as "a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter." 29 U.S.C. § 1144(c)(2).

Hydrostorage, 891 F.2d at 726.

[1] Although ERISA preempts state laws relating to employee benefit plans, ERISA has a "savings clause" which serves to exempt federal laws from ERISA preemption. 29

U.S.C. § 1144(d). Section 514(d) of ERISA, codified at 29 U.S.C. § 1144(d), provides that "[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law."

[2] ERISA therefore did not preempt the provisions of the preexisting National Apprenticeship Act, commonly known as the Fitzgerald Act, 29 U.S.C. § 50, or the regulations issued thereunder. The Fitzgerald Act provides:

> The Secretary of Labor is authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship. . . .

29 U.S.C. § 50. The regulations issued in conformance with the Fitzgerald Act are set forth at 29 C.F.R. § 29.1-29.13 (1990). These regulations provide for "a detailed regulatory scheme defining apprenticeship programs and their requirements, and establish a review, approval, and registration process for proposed apprenticeship programs administered by State Apprenticeship Councils under the aegis of the United States Department of Labor. . . ." *Siuslaw Concrete Construction Co. v. Washington, Dept. of Transportation*, 784 F.2d 952, 956 (9th Cir. 1986). The regulations establish the Bureau of Apprenticeship and Training, Employment and Training Administration (heretofore referred to as "the BAT"), for the purpose of administering the registration and approval of apprenticeship programs and other provisions of the regulations. 29 C.F.R. § 29.1. The BAT is authorized to certify apprenticeship standards and to register and approve local

apprenticeship programs and apprenticeship agreements for federal purposes. The regulations also authorize the BAT to approve appropriate state bodies for registration and/or approval of local apprenticeship programs and agreements for federal purposes. 29 C.F.R. § 29.2(o).

[3] 29 C.F.R. § 29.3 provides for a dual system of approval and recognition so that either the BAT or the State Apprenticeship Council can approve an apprenticeship program for federal purposes. However, either agency is constrained in its approval to apply the requirements and standards of the federal regulations.[2] In Nevada, the State Apprenticeship Council is a state agency authorized to approve apprenticeship programs for federal purposes under the provisions of these Fitzgerald Act regulations.

IV.

The basic idea of an apprenticeship program is to allow on-the-job training for apprentices who work under the supervision of journeymen and thus to encourage and assist persons

[2]29 C.F.R 29.3 provides:

> (a) Eligibility for various Federal purposes is conditioned upon a program's conformity with apprenticeship program standards published by the Secretary of Labor in this part. For a program to be determined by the Secretary of Labor as being in conformity with these published standards the program must be registered with the Bureau or registered with and/or approved by a State Apprenticeship Agency or Council recognized by the Bureau. Such determination by the Secretary is made only by such registration.
>
> (b) No apprenticeship program or agreement shall be eligible for Bureau registration unless (1) it is in conformity with the requirements of this part and the training is in an apprenticeable occupation having the characteristics set forth in 29.4 herein, and (2) it is in conformity with the requirements of the Department's regulation on "Equal Employment Opportunity in Apprenticeship and Training" set forth in 29 C.F.R. Part 30, as amended.

to enter into the skilled work force throughout the nation. In order for such an apprenticeship program to work, it is essential that the employer be able to pay lesser wages to apprentices while they are in training. Prevailing wage statutes for public works thus present a significant obstacle, unless apprenticeship programs are exempted. As noted by the above quoted regulations, an apprenticeship program can be approved for federal purposes either by the BAT or by a State Apprenticeship Council. Federal purposes include federal public works and public works deriving federal financial assistance. It is important to note that the State agency must apply the same standards as the BAT in approval of these apprenticeship programs.

[4] There is no exemption from the broad preemption provision of section 514(a) of ERISA except for the federal Fitzgerald Act and the regulations issued thereunder. 29 U.S.C. § 1144. Thus, any state regulation of apprenticeship programs that is separate and apart from the authorization given by the Fitzgerald Act and its accompanying regulations is preempted by section 514(a) of ERISA. *Id.*

[5] It is clear that the JAC apprenticeship program, sponsored by ABC and approved by BAT, is an apprenticeship program as defined by ERISA, and thus cannot be regulated by the State apart from its approval functions under the Fitzgerald Act regulations. As we have noted, in order for any apprenticeship program to work effectively, the employer must be able to pay a lesser wage to the apprentices while they are learning their skilled trade. The denial of the exemption to the BAT-approved JAC apprenticeship program, because it was not also approved by the Nevada State Apprenticeship Council, in effect forces ABC's JAC apprenticeship program to comply with the standards of the State Committee, independent and apart from the regulation authorized and provided for by the Fitzgerald Act and its accompanying regulations. The approval of the JAC apprenticeship program by BAT in effect establishes that that program meets the require-

ments of the Fitzgerald Act, the only apprenticeship regulations that are permissible as not being preempted by section 514(a) of ERISA. Any state regulation inconsistent with that determination is preempted by section 514(a) of ERISA. Thus, the decision of the district court in enjoining the Nevada Labor Commissioner from enforcing NRS § 338.080, so as not to exempt the JAC apprenticeship program from the provisions of the Nevada prevailing wage statutes, is warranted because an order denying the exemption amounts to indirect State regulation of the apprenticeship program.[3]

[6] We thus have a state law within the meaning of ERISA, 1144(c)(1), that requires the proposers of an apprenticeship program to comply with state standards apart from those set forth in the non-preempted Fitzgerald regulations. To be preempted under ERISA, a state law must both "relate to" and "purport to regulate" directly or indirectly an employee welfare benefit plan. *Hydrostorage*, 891 F.2d at 729; *Jones*, 846 F.2d at 1218. "A law 'purports to regulate' a plan if it attempts 'to reach in one way or another the terms and conditions of employee benefit plans.' " *Jones*, 846 F.2d at 1218 (quoting *Lane v. Goren*, 743 F.2d 1337, 1339 (9th Cir. 1984)). The intended action of the Nevada Labor Commissioner to deny the exemption of the JAC apprenticeship program because it had not obtained the approval of the State agency is an interpretation of a law that compels preemption. Just as our opinion in *Hydrostorage* did not declare the entire California statutory provision preempted but, instead, the administrative application of that provision preempted, so we do not conclude NRS § 338.080 preempted, but rather the Labor Commissioner's intended interpretation and application of it.

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[3]The contention that the Fitzgerald Act itself preempts state regulation has been foreclosed by our decision in *Siuslaw Concrete Const. v. Washington Dept. of Transp.*, 784 F.2d 952, 956-58 (9th Cir. 1986). The preemption is by operation of ERISA, which permits an exemption for programs regulated under the Fitzgerald Act but does not permit independent state regulation.

A situation analogous to that in Nevada was encountered in the state of Minnesota. There, the state agency had required an apprenticeship program to comply with a prescribed ratio of apprentices to journeymen pipefitters. The court stated that the minimum jobsite rule affected employee benefit plans and therefore held the state requirement to be preempted. *See Boise Cascade Corp. v. Peterson*, No. 90-5238 (8th Cir. filed July 29, 1991).

[7] Because we affirm the district court on the ground that the intended action of the Nevada Labor Commissioner under NRS § 338.080 is preempted by ERISA, we need not consider the alternate ground that this action violates the Equal Protection Clause of the United States Constitution. We therefore vacate that alternate portion of the judgment of the district court. We affirm the judgment of the district court, which states as follows:

> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that
>
> (1) defendant Frank MacDonald, in his official capacity as Labor Commissioner of the State of Nevada, and his successors, assigns, agents, employees and all officers of the Labor Commissioner of the State of Nevada, are hereby enjoined and restrained from enforcing the provisions of the Labor and Industrial Relations Code § 338.080 of the Nevada Revised Statutes (NRS) against plaintiffs Associated Builders and Contractors, Inc., Sierra Nevada Chapter; Electrical Joint Apprenticeship Committee; Sierra Nevada Chapter ABC Apprenticeship Trust Fund, and all employers who are utilizing the apprentice program of the Electrical Joint Apprenticeship Committee, with regard to wages paid to any employee enrolled or indentured as an apprentice in the program.

Paragraph 2 of that Order which relates to the Equal Protection Clause is vacated for the reasons above stated. The effect of the injunction is to require the Nevada Labor Commissioner to exempt apprenticeship programs approved by either the BAT or the State Apprenticeship Council as complying with the standards of the Fitzgerald Act and the regulations issued thereunder.

The only State regulation of apprenticeship programs permitted by ERISA is in the application of the standards of the regulations issued under the Fitzgerald Act. Those regulations permit alternate avenues for the approval of apprenticeship programs. BAT approval is equivalent to state approval of the apprenticeship program as meeting those standards. Thus, if the exemption of NRS § 338.080 is to apply at all, it must apply to programs that are approved by either BAT or the State Apprenticeship Council.

[8] We are confident that it would be contrary to Nevada legislative intent to construe NRS § 338.080 so as to preclude exemption of all apprenticeship programs approved by the State Apprenticeship Council. It is more consistent with legislative intent to construe N.R.S. § 338.080 so as to permit exemption of apprenticeship programs that are approved under the Fitzgerald Act Standards and not preempted by ERISA. This necessitates granting the exemption to an apprenticeship program that is certified as meeting those standards by either the BAT or the State Apprenticeship Council.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

ASSOCIATED BUILDERS AND CONTRACTORS, INC. SIERRA NEVADA CHAPTER; ELECTRICAL JOINT APPRENTICESHIP COMMITTEE; SIERRA NEVADA CHAPTER ABC APPRENTICESHIP TRUST FUND,	)	No. CV-N-89-409
Plaintiffs,	)	
vs.	)	
FRANK MacDONALD, in his Official Capacity as the Labor Commissioner of the State of Nevada,	)	
Defendant.	)	

December 22, 1989.
As Amended February 28, 1990.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

BRUCE R. THOMPSON, District Judge.

This is an action to enjoin enforcement against the plaintiffs of a Nevada statute, NRS 338.080, the effect of which is to require the compliance by contractors performing public works with the state prevailing wage law (NRS 338.010-338.090) with respect to apprentices unless the apprenticeship training program is approved by the Nevada State Apprenticeship Council.

Plaintiff Sierra Nevada Chapter of the Associated Builders and Contractors, Inc. (ABC Sierra Nevada) is a non-profit trade association, incorporated in Nevada, which represents contractors who bid on and perform private and public works projects in Nevada. ABC Sierra Nevada is not signatory to any labor or collective bargaining agreement and does not represent its members in collective bargaining. Plaintiff Electrical Joint Apprenticeship Committee (JAC) is an employee benefit trust fund existing and regulated pursuant to the provisions of the Employee Retirement Income Security Act, 29 U.S.C. 1001, *et seq.*, hereinafter referred to as ERISA.

The JAC program is sponsored by plaintiff ABC Sierra Nevada, and it is not the product of a collective bargaining agreement with any labor organization.

Plaintiff Sierra Nevada Chapter ABC Apprenticeship Trust Fund (trust fund) is also an employee benefit trust existing and regulated pursuant to the provisions of ERISA, 29 U.S.C. §1001, *et seq.* Created December 5, 1984 for the purpose of funding bona fide apprenticeship training programs to assist in the training and development of individuals who desire to acquire skills as employees within the construction industry, the trust fund acts as the funding mechanism for plaintiff JAC.

Defendant Frank MacDonald is the Labor Commissioner for the State of Nevada. The Nevada Labor

commissioner is empowered to enforce the provisions of the Nevada prevailing wage statutes, NRS §§338.010, *et seq.*, relating to the payment of wages on public works projects pursuant to NRS §338.015. The Labor Commissioner is also *ex officio* the secretary of the Nevada State Apprenticeship Council (SAC), pursuant to NRS §610.060, and is authorized to appoint members of the Nevada State Apprenticeship Council pursuant to NRS §610.030.

In 1984, ABC Sierra Nevada developed apprenticeship training standards for electrical apprentices in cooperation with the Bureau of Apprenticeship and Training (BAT) of the United States Department of Labor. The electrical apprenticeship program has operated with BAT approval, supplying apprentices to members/contractors of ABC Sierra Nevada doing electrical work, since that time.

On November 8, 1984, ABC Sierra Nevada presented it proposed non-union electrician apprenticeship standards to the Nevada State Apprenticeship Council (SAC). The SAC rejected the proposed apprenticeship standards on November 29, 1984, and refused to approve plaintiff's application for an apprenticeship program, despite the fact that the program already had been approved by BAT. The ABC JAC is a non-union apprenticeship program. No non-union construction trade apprenticeship program has ever been approved by the Nevada State Apprenticeship Council, although many have applied.

The federal statute relating to apprenticeship programs is refreshingly short. 29 U.S.C. §50 provides:

> The Secretary of Labor is authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by

> encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship, and to cooperate with the Office of Education under the department of Health, Education, and Welfare in accordance with section 17 of Title 20. For the purposes of this chapter the term 'State' shall include the District of Columbia.

The regulations flowing from this statutory authority reflect the need for recognition and cooperation with state apprenticeship programs as well as the promotion of federal activity in the area. The existence of dual control is recognized in the following selected passages from the regulations:

> 29 C.F.R. §29.1(b).
>
> The purpose of this part is to set forth labor standards to safeguard the welfare of apprentices, and to extend the application of such standards by prescribing policies and procedures concerning the registration, for certain Federal purposes, or [of] acceptable apprenticeship programs with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training. These labor standards, policies and procedures cover the registration, cancellation and deregistration or apprenticeship programs and of apprenticeship agreements; the recognition of

a State agency as the appropriate agency for registering local apprenticeship programs for certain Federal purposes; and matter relating thereto.

29 C.F.R. §29.2(l).

'Registration of an apprenticeship program' shall mean the acceptance and recording of such program by the Bureau of Apprenticeship and Training, or registration and/or approval by a recognized State Apprenticeship Agency, as meeting the basic standards and requirements of the Department for approval of such program for Federal purposes. Approval is evidence by a Certificate of Registration or other written indicia.

29 C.F.R. §29.3(a).

Eligibility for various Federal purposes is conditioned upon a program's conformity with apprenticeship program standards published by the Secretary of Labor in this part. For a program to be determined by the Secretary of Labor as being in conformity with these published standards the program must be registered with the Bureau or registered with and/or approved by a State apprenticeship Agency or Council recognized by the Bureau. Such determination by the Secretary is made only by such registration.

29 C.F.R. §29.3(f).

Operating apprenticeship programs when approved by the Bureau shall be

accorded registration evidenced by a Certificate of Registration. Programs approved by recognized State Apprenticeship Agencies shall be accorded registration and/or approval evidenced by a similar certificate or other written indicia. When approved by the Bureau, national apprenticeship standards for policy or guideline use shall be accorded certification, evidence by a certificate attesting to the Bureaus' approval.
29 C.F.R. §29.12(a).

The Secretary's recognition of a State Apprenticeship Agency or Council (SAC) gives the SAC the authority to determine whether an apprenticeship program conforms with the Secretary's published standards and the program is, therefore, eligible for those Federal purposes which require such a determination by the Secretary....
29 C.F.R. §29.30(1).

This part sets forth policies and procedures to promote equality of opportunity in apprenticeship programs registered with the U.S. Department of Labor and in state apprenticeship programs registered with recognized state apprenticeship agencies. These policies and procedures apply to the recruitment and selection of apprentices, and to all conditions of employment and training during apprenticeship. The procedures established provide for review of apprenticeship programs, for registering apprenticeship

> programs, for processing complaints, and for deregistering noncomplying apprenticeship programs. This part also provides policies and procedures for continuation or withdrawal of recognition of state agencies for registering of apprenticeship programs for Federal purposes. The purpose of this part is to promote equality of opportunity in apprenticeship b prohibiting discrimination based on race, color, religion, national origin, or sex in apprenticeship programs, by requiring affirmative action to provide equal opportunity in such apprenticeship programs, and by coordinating this part with other equal opportunity programs.

It seem obvious to this court that the foregoing law ad regulations provide for a dual system of apprenticeship programs, programs authorized by BAT and programs authorized by SAC. The state law governing wages on public works in Nevada, however, allows apprenticeship wages only for apprenticeship programs authorized by SAC. Inasmuch as the general field of apprenticeship training has been preempted by the Fitzgerald Act (29 U.S.C. §50 *et seq.*) and the delegation of authority to state apprenticeship councils is controlled by federal law, state laws affecting wages paid to apprentices must apply equally to BAT approved and SAC approved apprenticeship programs. A state law which grants a significant benefit only to SAC approved programs is discriminatory and unconstitutional.

The argument for preemption in these circumstances seems to us to be substantially supported by *Wisconsin Dept. of Industry v. Gould, Inc.*, 475 U.S. 282, 106 S.Ct. 1057, 89 L.Ed.2d 223 (1986). There a state statute which

prohibited the state from purchasing any product from a seller known to have violated the NLRB in three or more adjudicated cases was held unconstitutional and preempted by the National Labor Relations Act. After thorough discussion the court concluded:

> We are not faced here with a statute that can even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs, or with a law that pursues a task Congress intended to leave to the States. The manifest purpose and inevitable effect of the debarment rule is to enforce the requirements of the NLRA. That goal may be laudable, but it assumes for the State of Wisconsin a role Congress reserved exclusively for the Board.

So here. No legitimate state interest has ben suggested for treating federally approved apprenticeship programs. The wage scale of apprentices employed on public contracts is of seminal importance to both contracting parties and to the employees. NRS 338.080(2) exempting from the requirements of the prevailing wage law only: "Apprentices recorded under the provisions of Chapter 610 of NRS" cannot be sustained.

Plaintiffs' principle contention is that any state regulation of a federally approved apprenticeship program is preempted by ERISA because plaintiff JAC is an employee benefit trust fund and plaintiff ABC Sierra Nevada apprenticeship trust fund is an employee benefit trust fund established pursuant to 29 U.S.C. §1002(1). Prime support for this argument is found in *Hydrostorage, Inc. v. Northern California Boilermakers*, 685 F.Supp. 718 (N.D.Cal. 1988), affirmed 891 F.2d 719 (9th Cir. 1989). ERISA's

preemption clause preempts "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. §1144(a).

The apprenticeship standards for electrical construction adopted by the Sierra Nevada Chapter of Associated Contractors and Builder, Inc. in cooperation with BAT, provides in section XX on page 10, a specific schedule of apprentice wages. These standards were approved by BAT. The Nevada statute at issue, NRS 338.080, is directly inconsistent with these standards and thus is preempted under the authority of the *Hydrostorage* case.

At the hearing held October 20, 1989, the parties stipulated that the hearing on the motion for preliminary injunction be telescoped with the final trial. Accordingly, this is a final decision and judgment.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

(1) defendant Frank MacDonald, in his official capacity as Labor Commissioner of the State of Nevada, and his successors, assignees, agents, employees and all officers of the Labor Commissioner of the State of Nevada, are hereby enjoined and restrained from enforcing the provision of the Labor and Industrial Relations Code §338.080 of the Nevada Revised Statutes (NRS) against plaintiffs Associated Builders and Contractors, Inc., Sierra Nevada Chapter; Electrical Joint Apprenticeship Committee; Sierra Nevada Chapter ABC Apprenticeship Trust Fund, and all employers who are utilizing the apprentice program of the Electrical Joint Apprenticeship Committee, with regard to wages paid to any employee enrolled or indentured as an apprentice in the program; and

(2) the provisions of NRS 338.080 are unconstitutional on their face and as applied to plaintiffs herein, and all other similarly situated apprenticeship programs approved by the United States Department of Labor, Bureau of Apprenticeship and Training, and not approved by the State of Nevada pursuant to NRS 610.010, *et seq.*

APPENDIX C

29 U.S.C. §§1144(a) and (d)

(a) Supersedure; effective date. Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975.

***

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of the United States prohibited. Nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 111 and 507(b)) or any rule or regulation issued under any such law.

50 U.S.C. §50

The Secretary of Labor is hereby authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship, and to cooperate with the National Youth Administration and with the Office of Education in the Department of the Interior Agency in accordance with section 6 of the Act of february 23, 1917 (39 Stat. 932), as amended

by Executive Order Numbered 6166, June 10, 1933, issued pursuant to an Act of June 30, 1932 (47 Stat. 414), as amended. For the purposes of this Act the term "State" shall include the District of Columbia.

Selected Portions of 29 C.F.R. Part 29

29 C.F.R. §29.1(b).

(b) The purpose of this part is to set forth labor standards to safeguard the welfare of apprentices, and to extend the application of such standards by prescribing policies and procedures concerning the registration, for certain Federal purposes, or acceptable apprenticeship programs with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training. These labor standards, policies and procedures cover the registration, cancellation and deregistration or apprenticeship programs and of apprenticeship agreements; the recognition of a State agency as the appropriate agency for registering local apprenticeship programs for certain Federal purposes and matters relating thereto.

29 C.F.R. §29.2(o).

(o) *Recognized State Apprenticeship Agency or recognized State Apprenticeship Council* shall mean an organization approved by the Bureau as an agency or council which has been properly constituted under and acceptable law or Executive order, and has been approved by the Bureau as the appropriate body for State registration and/or

approval of local apprenticeship programs and agreements for Federal purposes.

29 C.F.R. §29.12.

(a) The Secretary's recognition of a State Apprenticeship Agency or Council (SAC) gives the SAC the authority to determine whether an apprenticeship program conforms with the Secretary's published standards and the program is, therefore, eligible for those Federal purposes which require such a determination by the Secretary. Such recognition of a SAC shall be accorded by the Secretary upon submission and approval of the following:

(1) An acceptable State apprenticeship law (or Executive order), and regulations adopted pursuant thereto;

(2) Acceptable composition of the State Apprenticeship Council (SAC);

(3) An acceptable State Plan for Equal Employment Opportunity in Apprenticeship;

(4) A description of the basic standards, criteria, and requirements for program registration and/or approval; and

(5) A description of policies and operating procedures which depart from or impose requirements in addition to those prescribed in this part.

(b) *Basic requirements.* Generally the basic requirements under the matters covered in paragraph (a) of this section shall be in conformity with applicable requirements as set forth in this part. Acceptable State provisions shall:

(1) Establish the apprenticeship agency in: (i) The State Department of Labor, or (ii) in that agency of State government having jurisdiction of laws and regulations governing wages, hours, and working conditions, or (iii)

that State agency presently recognized by the Bureau, with a State official empowered to direct the apprenticeship operation;

(2) Require that the State Apprenticeship Council be composed of persons familiar with apprenticeable occupations and an equal number of representatives of employer and of employee organizations and may include public members who shall not number in excess of the number named to represent either employer or employee organizations. Each representative so named shall have one vote. Ex officio members may be added to the council but they shall have no vote except where such members have a vote according to the established practice of a presently recognized council. If the State official who directs the apprenticeship operation is a member of the council, provision may be made for the official to have a tie-breaking vote;

(3) Clearly delineate the respective powers and duties of the State official and of the council;

(4) Clearly designate the officer or body authorized to register and deregister apprenticeship programs and agreements;

(5) Establish policies and procedures to promote equality of opportunity in apprenticeship programs pursuant to a State Plan for Equal Employment Opportunity in Apprenticeship which adopts and implements the requirements of 29 CFR part 30, as amended, and to require apprenticeship programs to operate in conformity with such State Plan and 29 CFR part 30, as amended;

(6) Prescribe the contents of apprenticeship agreements;

(7) Limit the registration of apprenticeship programs to those providing training in *apprenticeable* occupations as defined in §29.4;

(8) Provide that apprenticeship programs and standards of employers and unions in other than the building and construction industry, which jointly form a sponsoring entity on a multistate basis and are registered pursuant to all requirements of this part by any recognized State Apprenticeship Agency/Council or by the Bureau, shall be accorded registration or approval reciprocity by any other State Apprenticeship Agency/Council or office of the Bureau if such reciprocity is requested by the sponsoring entity;

(9) Provide for the cancellation, deregistration and/or termination of approval of programs, and for temporary suspension, cancellation, deregistration and/or termination of approval of apprenticeship agreements; and

(10) Provide tat under a program proposed for registration by an employer or employers' association, and where the standards, collective bargaining agreement or other instrument provides for participation by a union in any manner in the operation of the substantive mattes of the apprenticeship program, and such participation is exercised, written acknowledgement of union agreement or *no objection* to the registration is required. Where no such participation is evidenced and practiced, the employer or employers' association shall simultaneously furnish to the union, if any, which is the collective bargaining agent of the employees to be trained, a copy of its application for registration and of the apprenticeship program. The State agency shall provide a reasonable time period of not less than 30 days nor more than 60 days for receipt of union comments, if any, before final action on the application for registration and/or approval.

(c) *Application for recognition.* A State apprenticeship Agency/Council desiring recognition shall submit to the Administrator, BAT, the documentation specified in §29.12(a) of this part. A currently recognized Agency/Council desiring continued recognition by the Bureau shall submit to the Administrator the documentation specified in §29.12(a) of this on or before July 18, 1977. An extension of time within which to comply with the requirements of this part may be granted by the Administrator for good cause upon written request by the State agency but the Administrator shall not extend the time for submission of the documentation required by §29.12(a). The recognition of currently recognized Agencies/Councils shall continue until July 18, 1977 and during any extension period granted by the Administrator.

(d) *Appeal from denial of recognition.* The denial by the Administrator of a State agency's application for recognition under this part shall be in writing and shall set forth the reasons for the denial. The notice of denial shall be sent to the applicant by certified mail, return receipt requested. The applicant may appeal such a denial to the Secretary by mailing or otherwise furnishing to the Administrator, within 30 days of receipt of the denial, a notice of appeal addressed to the Secretary and setting forth the following items:

(1) A statement that the applicant appeals to the Secretary to reverse the Administrator's decision to deny its application;

(2) The date of the Administrator's decision and the date the applicant received the decision;

(3) A summary of the reasons why the applicant believes that the Administrator's decision was incorrect;

(4) A copy of the application for recognition and subsequent modifications, if any;

(5) A copy of the Administrator's decision of denial. Within 10 days of receipt of a notice of appeal, the Secretary shall assign an Administrative Law Judge to conduct hearings and to recommend findings of fact and conclusions of law. The proceedings shall be informal, witnesses shall be sworn, and the parties shall have the right to counsel and of cross-examination.

The Administrative Law Judge shall submit the recommendations and conclusions, together with the entire record to the Secretary for final decision. The Secretary shall make his final decision in writing within 30 days of the Administrative Law Judge's submission. The Secretary may make a decision granting recognition conditional upon the performance of one or more actions by the applicant. In the event of such a conditional decision, recognition shall not be effective until the applicant has submitted to the Secretary evidence that the required actions have been performed and the Secretary has communicated to the applicant in writing that he is satisfied with the evidence submitted.

(e) *State apprenticeship programs.* (1) An apprenticeship program submitted for registration with a State Apprenticeship Agency recognized by the Bureau shall, for Federal purposes, be in conformity with the State apprenticeship law, regulations, and with the State Plan for Equal Employment Opportunity in Apprenticeship as submitted to and approved by the Bureau pursuant to 29 CFR 30.15, as amended.

(2) In the event that a State Apprenticeship Agency is not recognized by the Bureau for Federal purposes, or that such recognition has been withdrawn, or if no State

Apprenticeship Agency exists, registration with the Bureau may be requested. Such registration shall be granted if the program is conducted, administered and operated in accordance with the requirements of this part and the equal opportunity regulation in 29 CFR part 30, as amended.

29 C.F.R. §29.13.

The recognition for Federal purposes of a State Apprenticeship Agency of State Apprenticeship Council (hereinafter designated *respondent*), may be withdrawn for the failure to fulfill, or operate in conformity with, the requirements of this part. Derecognition proceedings for reasonable cause shall be instituted in accordance with the following:

(a) Derecognition proceedings for failure to adopt or properly enforce a State Plan for Equal Employment Opportunity in Apprenticeship shall be processed in accordance with the procedures prescribed in 29 CFR 30.15.

(b) For causes other than those under paragraph (a) above, the Bureau shall notify the respondent and appropriate State sponsors in writing, by certified mail, with return receipt requested. The notice shall set forth the following:

(1) That reasonable cause exists to believe that the respondent has failed to fulfill or operate in conformity with the requirements of this part;

(2) The specific areas of nonconformity;

(3) The needed remedial measures; and

(4) That the Bureau proposes to withdraw recognition for Federal purposes unless corrective action is taken or a hearing request mailed, within 30 days of the receipt of the notice.

(c) If, within the 30-day period, respondent:

(1) Complies with the requirements, the bureau shall so notify the respondent and State sponsors, and the case shall be closed;

(2) Fails to comply or to request a hearing, the Bureau shall decide whether recognition should be withdrawn. If the decision is in the affirmative, the Administrator shall forward al pertinent data to the Secretary, together with the findings and recommendation. The Secretary shall make the final decision, based upon the record before him.

(3) Requests a hearing, the Administrator shall forward the request to the Secretary, and the procedures under §29.9 shall be followed, with notice thereof to the State apprenticeship sponsors.

(d) If the Secretary determines to withdraw recognition for Federal purposes, he shall notify the respondent and the State sponsors of such withdrawal. The notice to the sponsors shall state that, 30 days after the date of the Secretary's order withdrawing recognition of the State agency, the Department shall cease to recognize, for Federal purposes, each apprenticeship program registered with the State agency unless, within that time, the State sponsor requests registration with the Bureau. The Bureau may grant the request for registration contingent upon its finding that the State apprenticeship program is operating in accordance with the requirements of this part and of 29 CFR part 30, as amended. The Bureau shall make a finding on this issue within 30 days of receipt of the request. If the finding is in the negative, the State sponsor shall be notified in writing that the contingent Bureau registration has been revoked. If the finding is in the affirmative, the State sponsor shall be

notified in writing that the contingent Bureau registration is made permanent.

(e) If the sponsor fails to request Bureau registration, or upon a finding of noncompliance pursuant to a contingent Bureau registration, the written notice to such State sponsor shall further advise the recipient that any actions or benefits applicable to recognition *for Federal purposes* are no longer available to participants in its apprenticeship program.

(f) Such notice shall also direct the State sponsor to notify, within 15 days, all its registered apprentices of the withdrawal of recognition for Federal purposes; the effective date thereof; and that such withdrawal removes the apprentice from coverage under any Federal provision applicable to his/her individual registration under a program recognized or registered by the Secretary of Labor for Federal purposes.

(g) A State Apprenticeship Agency or Council whose recognition has been withdrawn pursuant to this part may have its recognition reinstated upon presentation of adequate evidence that it has fulfilled, and is operating in accordance with, the requirements of this part.

42 Federal Register at 10139, paragraph 8

8. Several persons believed that the requirements contained throughout § 29.12 represent an unwarranted intrusion of Federal control into the operations of the SACs. The Department believes that this conclusion is not correct.

As far as the Department knows, the recognized SACs are already in substantial conformity with the minimum standards set forth in this § with the exception of paragraphs (b)(8) and (b)(10), which have been addressed

earlier. Where they are not, paragraph (c) affords the State a 120-day period within which to conform. An extension of time may be granted by the Administrator of the Bureau for good cause.

It does not seem to the Department that it will be an undue hardship for the SACs to conform to the minimal requirements set forth in this part or to provide to the Department the information required by § 29.12(a), since recognition by the Secretary has important economic effects (as in the operation of the Davis-Bacon Act and the Service Contract Act) and important effects in promoting and improving the apprenticeship system. For these reasons it seems reasonable to the Department that the Secretary have documentary evidence that a recognized State agency is conforming to the minimum standards set forth in this part.

Some persons have read §29.12(a)(5) in a manner which does not appear justified by the text. It requires a SAC to submit to the Bureau "a description of policies and operating procedures which depart from or impose requirements in addition to those prescribed in this part." While the Bureau has the right to approve or disapprove such variations, the purpose of this provision is not to enable the Bureau to control SACs or to dictate policies and procedures. Rather, it allows the Secretary to be informed of the policies and procedures of the SACs to which the Secretary has accorded recognition. The Department can then make its own judgment on whether these policies and procedures conflict with the requirements of this part.

NRS 338.080

Exemptions. None of the provisions of NRS 338.020 to 338.090, inclusive, apply to:

1. Any work, construction, alteration, repair or other employment performed, undertaken, or carried out, by or for any railroad company or any person operating the same, whether such work, construction, alteration or repair is incident to or in conjunction with a contract to which this state or any of its political subdivisions is a party, or otherwise.

2. Apprentices recorded under the provisions of chapter 610 of NRS.

3. Any contract for a public work whose cost is less than $100,000. A unit of the project must not be separated from the total project, even if that unity is to be completed at a later time, in order to lower the cost of the project below $100,000.